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MNZMN v Public Prosecutor and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-05(H)-34–01 OF 2022, B-05(H)-35–01 OF 2022, B-05(H)-36–01 OF 2022 AND B-05(H)-37–01 OF 2022
HADHARIAH SYED ISMAIL, GUNALAN MUNIANDY AND LIM CHONG FONG JJCA
29 MAY 2023

C

Criminal Procedure — Sentence — Child offender — Appellant was child offender — Appellant pleaded guilty to charges under s 14(a) of Sexual Offences Against Children Act 2017 and s 377 of Penal Code — Magistrate convicted appellant and placed him in Henry Gurney School for three years — Judicial commissioner affirmed magistrate's decision — Whether judicial commissioner misdirected herself by failing to properly construe and apply the conjunctive sub-provisions in s 75(1) of Child Act 2001 — Whether court should invoke s 91(1)(da) of Child Act 2001 — Child Act 2001 ss 69, 75(1), 91(1)(da), 96(2), 98(1)(b) & (c) — Penal Code ss 52B & 377

D

E

The appellant who was 15 years old at the material time was charged in the Court for Children at Sepang for sexual offences under s 14(a) of the Sexual Offences Against Children Act 2017 ('the SOACA') (two charges) and under s 377 of the Penal Code ('the PC') (one charge). The appellant was also charged in the Court for Children at Petaling Jaya under s 14(a) of the SOACA (one charge). The appellant had pleaded guilty to all the four charges. After having read the probation report produced by the welfare officer as well as having heard the recommendations of the two advisors appointed pursuant to the Child Act 2001 ('the CA'), each of the magistrates in the Court for Children at Sepang and Petaling Jaya ordered that the appellant was to be placed in the Henry Gurney School for a period of three years. On appeal, the learned judicial commissioner ('the JC') dismissed the appeal and affirmed the order imposed by the magistrates, hence, the present appeals. In the present appeal, the appellant argued that the magistrates as well as the JC had made a serious misdirection by accepting the probation report produced by the welfare officer because such report contravened s 75(1)(b) of the CA in that the report was devoid of any finding therein that the appellant was not suitable to be rehabilitated in an approved school and thus, justified that he should be sent to the Henry Gurney School. In the premises, the order was irregularly imposed. The appellant further argued that a lighter punishment ought to be meted based on one of the other options provided in s 91(1) of the CA.

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Held, allowing the appeals, and setting aside the order of the High Court:

(1) It was not in dispute that the offences committed by the appellant attracted a mandatory punishment of imprisonment when committed by an adult. Hence, the provision in s 75(1)(a) of the CA had been satisfied. However, there was a discretion given to the court if the offences were committed by a child as provided in s 96(2) of the CA. In relation to the requirement of the probation report showing that the child was not suitable to be rehabilitated in an approved school as provided in s 75(1)(b) of the CA, the respondent conceded that this had not been shown in both probation reports produced by the welfare officer for use in both the Court for Children at Sepang and Petaling Jaya (see paras 28–29).

(2) In respect to the provision in s 75(1)(c)(i) of the CA, the court noticed that the JC equated the phrase 'the offence is serious in nature' with a serious offence as defined in s 52B of the PC which denoted an offence punishable with imprisonment for a term of ten years or more. The court however held that the phrase did not necessarily mean as such. The court was of the view that the court had to make an objective assessment on every relevant feature and character of the offence vis a vis the young offender particularly whether he/she knew the legal consequences thereof, apart from just the prescribed imprisonment term (see para 30).

(3) As to s 75(1)(c)(ii) of the CA, the court noticed that the JC accepted the findings of the magistrates on the appellant's criminal habits and tendencies only as inflicted upon the three victims. There was however conspicuous absence of cogent consideration as to whether by reason of these habits and tendencies of the appellant, it was expedient that the appellant must be detained and subject to the instruction and discipline as that administered in the Henry Gurney School only (see para 31).

(4) In exercising the court's appellate duty as the apex court, the court had reviewed s 75(1) of the CA as a whole and held that the concluding phrase 'the Court For Children shall, after considering the probation report, send the child to a Henry Gurney School' required the court to evaluate on the explanation of the welfare officer in the probation report with regard to unsuitability of the appellant to be rehabilitated in an approved school. In the absence of such an explanation, the court found that the order imposed on the appellant based on the infirmed probation report was illegal (see para 33).

(5) Based on the facts, the appellant was a first-time offender as well as he had pleaded guilty to all the charges. Further, the court was convinced that the appellant was remorseful and seemed to have turn from his adolescent sexually mischievous way to decent living by presently concentrating on his study towards a better future. It was plain that the court could not presently send the appellant to an approved school because he was over aged (see s 69 of the CA). Nonetheless, the court was satisfied that he did

not require further preventive and rehabilitative detention. Further, based on s 98(1)(b) and (c) of the CA, the court was also prohibited to make probation order because the offences here concerned outraging modesty and s 377 of the PC. The court therefore concluded that the appropriate punishment was to invoke s 91(1)(da) of the CA and order the appellant to perform community service of total of 100 hours as prescribed and supervised by the Social Welfare Department, Ministry of Women, Family and Community Development which may include undergoing counselling, religious and moral education thereat (see paras 41–44).

[Bahasa Malaysia summary

Perayu yang berumur 15 tahun pada masa yang material didakwa di Mahkamah Kanak-Kanak di Sepang atas kesalahan seksual di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('AKSTK') (dua pertuduhan) dan di bawah s 377 Kanun Keseksaan ('KK') (satu pertuduhan). Perayu juga didakwa di Mahkamah Kanak-Kanak di Petaling Jaya di bawah s 14(a) AKSTK (satu pertuduhan). Perayu telah mengaku bersalah terhadap keempat-empat pertuduhan tersebut. Selepas membaca laporan akhlak yang dikeluarkan oleh pegawai kebajikan serta mendengar syor dua penasihat yang dilantik menurut Akta Kanak-Kanak 2001 ('AKK'), kedua-dua majistret di Mahkamah Kanak-Kanak di Sepang dan Petaling Jaya memerintahkan supaya perayu ditempatkan di Sekolah Henry Gurney untuk tempoh tiga tahun. Semasa rayuan, pesuruhjaya kehakiman yang bijaksana ('PK') menolak rayuan tersebut dan mengesahkan perintah yang dikenakan oleh majistret, justeru, rayuan-rayuan semasa. Dalam rayuan-rayuan semasa, perayu berhujah bahawa majistret serta PK telah membuat salah arah yang serius dengan menerima laporan akhlak yang dikemukakan oleh pegawai kebajikan kerana laporan tersebut melanggar s 75(1)(b) AKK kerana tiada apa-apa dapatan di dalam laporan tersebut yang menyatakan bahawa perayu tidak sesuai untuk dipulihkan di sekolah yang diluluskan dan dengan itu, mewajarkan dia dihantar ke Sekolah Henry Gurney. Atas alasan tersebut, perintah tersebut dikenakan secara tidak teratur. Perayu selanjutnya berhujah bahawa hukuman yang lebih ringan sepatutnya dikenakan berdasarkan salah satu pilihan lain yang diperuntukkan dalam s 91(1) AKK.

Diputuskan, membenarkan rayuan-rayuan dan mengenepikan perintah Mahkamah Tinggi:

(1) Tidak menjadi pertikaian bahawa kesalahan yang dilakukan oleh perayu akan membawa kepada hukuman mandatori penjara apabila dilakukan oleh orang dewasa. Oleh itu, peruntukan dalam s 75(1)(a) AKK telah dipenuhi. Walau bagaimanapun, terdapat budi bicara yang diberikan kepada mahkamah jika kesalahan tersebut dilakukan oleh kanak-kanak seperti yang diperuntukkan dalam s 96(2) AKK. Berhubung dengan

keperluan laporan akhlak yang menunjukkan bahawa kanak-kanak tersebut tidak sesuai untuk dipulihkan di sekolah yang diluluskan seperti yang diperuntukkan dalam s 75(1)(b) AKK, responden mengakui bahawa ini tidak ditunjukkan dalam kedua-dua laporan akhlak yang dikeluarkan oleh pegawai kebajikan untuk kegunaan di Mahkamah Kanak-Kanak di Sepang dan Petaling Jaya (lihat perenggan 28–29).

(2) Berkenaan dengan peruntukan dalam s 75(1)(c)(i) AKK, mahkamah mendapati bahawa PK menyamakan frasa 'kesalahan itu adalah daripada jenis yang serius' dengan kesalahan serius seperti yang ditakrifkan dalam s 52B KK yang menandakan kesalahan yang boleh dihukum penjara selama tempoh sepuluh tahun atau lebih. Mahkamah bagaimanapun berpendapat bahawa frasa tersebut tidak semestinya bermaksud sedemikian. Mahkamah berpandangan bahawa mahkamah perlu membuat penilaian objektif ke atas setiap ciri dan sifat kesalahan yang berkaitan dengan pesalah muda terutamanya sama ada dia tahu akibat undang-undangnya, selain daripada tempoh pemenjaraan yang ditetapkan (lihat perenggan 30).

(3) Mengenai s 75(1)(c)(ii) AKK, mahkamah mendapati bahawa PK menerima penemuan majistret mengenai tabiat dan kecenderungan jenayah perayu terhadap ketiga-tiga mangsa sahaja. Walau bagaimanapun, terdapat ketiadaan pertimbangan yang jelas tentang sama ada oleh sebab tabiat dan kecenderungan perayu ini, adalah wajar perayu perlu ditahan dan tertakluk kepada arahan dan disiplin seperti yang ditadbir di Sekolah Henry Gurney sahaja (lihat perenggan 31).

(4) Dalam melaksanakan tugas rayuan mahkamah sebagai mahkamah tertinggi, mahkamah telah menyemak s 75(1) AKK secara keseluruhan dan memutuskan bahawa frasa penutup 'maka Mahkamah Bagi Kanak-Kanak hendaklah, atas syor pegawai akhlak, menghantar kanak-kanak itu ke Sekolah Henry Gurney' menghendaki mahkamah menilai penjelasan pegawai kebajikan dalam laporan akhlak berkenaan dengan ketidaksesuaian perayu untuk dipulihkan di sekolah yang diluluskan. Sekiranya tiada penjelasan sedemikian, mahkamah mendapati perintah yang dikenakan ke atas perayu berdasarkan laporan akhlak yang tidak lengkap adalah menyalahi undang-undang (lihat perenggan 33).

(5) Berdasarkan fakta, perayu merupakan pesalah kali pertama serta dia telah mengaku bersalah terhadap semua pertuduhan. Tambahan pula, mahkamah yakin perayu berasa kesal dan seolah-olah telah beralih daripada cara nakal seksual remajanya kepada kehidupan yang baik dengan kini menumpukan perhatiannya pada pelajarannya ke arah masa depan yang lebih baik. Adalah jelas bahawa mahkamah tidak boleh menghantar perayu ke sekolah yang diluluskan pada masa ini kerana dia sudah melebihi umur (lihat s 69 AKK). Namun begitu, mahkamah

berpuas hati bahawa dia tidak memerlukan penahanan pencegahan dan pemulihan selanjutnya. Selanjutnya, berdasarkan s 98(1)(b) dan (c) AKK, mahkamah juga dilarang membuat perintah percubaan kerana kesalahan di sini melibatkan pencabulan kehormatan dan s 377 KK. Oleh itu, mahkamah membuat kesimpulan bahawa hukuman yang sewajarnya adalah dengan menggunapakai s 91(1)(da) AKK dan memerintahkan perayu melaksanakan khidmat masyarakat selama 100 jam seperti yang ditetapkan dan diselia oleh Jabatan Kebajikan Masyarakat, Kementerian Pembangunan Wanita, Keluarga dan Masyarakat yang mungkin termasuk menjalani kaunseling, pendidikan agama dan moral di situ (lihat perenggan 41-44).]

Cases referred to

PP v Tia Ah Leng [2000] 5 MLJ 401; [2000] 5 CLJ 614, SC (folld)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)
Sia Kwong Sang v Inspector General of Police & Ors and other appeals [1991] 1 MLJ 502, SC (refd)

Legislation referred to

Child Act 2001 ss 69, 75(1), 75(1)(a), (1)(b), (1)(c), (1)(c)(i), (1)(c)(ii), 96(2), 91(1), 91(1)(da), 98, 98(1)(b), (1)(c)
Penal Code ss 52B, 377C
Sexual Offences Against Children Act 2017 s 14(a)

Appeal from: Criminal Appeal No BA-41H-88–10 of 2020, BA-41H-87–10 of 2020 & BA-41H-132–11 of 2020 (High Court, Shah Alam)

Mohd Khairul Azam bin Abdul Aziz (with Aisyah Nabihah bt Mohd Yusri) (Azam Aziz & Co) for the appellant.
Ng Siew Yee (Selangor State Legal Advisor's Office) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] There are four related appeals before this court as follows:

(a) Criminal Appeals No B-05(H)-35–01 of 2020, B-05(H)-36–01 of 2020, and B-05(H)-37–01 of 2020 that originated from the Court for Children at Sepang, Selangor; and

(b) Criminal Appeal No B-05(H)-34–01 of 2020 that originated from the Court for Children at Petaling Jaya, Selangor.

(collectively 'appeals')

[2] The appeals are against the order imposed on sexual offences committed by a child.

[3] The appellant who was 15 years old at the time has been charged in the Court for Children at Sepang as follows in the national language:

No. Kes: BK-84-21-08/2020

Pertuduhan:

Bahawa kamu pada 9hb Julai 2020 jam lebih kurang 3.00 petang bertempat di no. 12, Jalan Nusaputra 1/3C Bandar Nusaputra, di dalam Daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah melakukan amang seksual fizikal ke atas seorang kanak-kanak perempuan bernama NNMN dengan menyentuh, meramas payudara dan telah cuba memasukkan jari ke dalam kemaluannya. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dituduh and dihukum di bawah seksyen 14(a) Akta Kesalahan-Kesalahan Seksual terhadap Kanak-Kanak 2017.

No. Kes: BK-84-22-08/2020

Pertuduhan Pertama:

Bahawa kamu pada 2hb Mac 2020 jam antara 4.00 petang di bumbung foyer Tamarind Square Cyberjaya di dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan telah melakukan amang seksual fizikal ke atas kanak-kanak dengan cara menyentuh bagi maksud mana-mana bahagian fizikal AA dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 14(a) Akta Kesalahan-Kesalahan Seksual terhadap Kanak-Kanak 2017.

Pertuduhan Kedua:

Bahawa kamu pada 2hb Mac 2020 jam antara 4.00 petang di bumbung foyer Tamarind Square Cyberjaya di dalam daerah Sepang, di dalam Negeri Selangor Darul Ehsan dengan sengaja telah melakukan persetubuhan yang bertentangan dengan aturan tabii iaitu dengan memasukkan zakar kamu ke dalam mulut AA tanpa kerelaannya atau bertentangan atau dengan meletakan ketakutan atau kematian kepada orang lain. Dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 377C Kanun Keseksaan.

[4] Furthermore, the appellant has been charged in the Court for Children at Petaling Jaya as follows in the national language:

No. Kes: BB-M3-84-53-08/2020

Pertuduhan:

Bahawa kamu pada 9hb Julai 2020 jam lebih kurang 11.00 pagi di alamat no. 12 Jalan LEP 7/6 Taman Lestari Putra, 43300 Seri Kembangan dalam daerah Petaling di dalam Negeri Selangor Darul Ehsan dengan sengaja telah melakukan amang seksual fizikal ke atas kanak-kanak dengan cara memeluk, mencium,, meramas buah dada, dan memegang kemaluan NKCK yang berumur 16 tahun 5 bulan tanpa kerelaannya. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 14(a) Akta Kesalahan-Kesalahan Seksual terhadap Kanak-Kanak 2017.

IN THE COURT FOR CHILDREN AT SEPANG

[5] The three charges proffered against the appellant were heard together. These charges were read on two occasions on 14 August 2020 and 23 September 2020.

[6] The appellant who was represented by counsel understood the charges and pleaded guilty to all of them as charged.

[7] After having read the probation report produced by the welfare officer as well as having heard the recommendations of the two advisors appointed pursuant to the Child Act 2001 ('the CA') and submission of the appellant's counsel and deputy public prosecutor, the learned magistrate on 23 September 2020 ordered the appellant to be placed in the Henry Gurney School for a period of three years.

IN THE COURT FOR CHILDREN AT PETALING JAYA

[8] The charge proffered against the appellant was read on three occasions on 7 August 2020, 1 October 2020 and 4 February 2021.

[9] The appellant who was represented by counsel understood the charge and pleaded guilty as charged.

[10] Likewise, after having read the probation report produced by the welfare officer as well as having heard the recommendations of the two advisors appointed pursuant to the CA and submission of the appellant's counsel and deputy public prosecutor, the learned magistrate on 4 February 2021 ordered the appellant to be placed in the Henry Gurney School for a period of three years too.

IN THE HIGH COURT

[11] The appellant appealed against the order imposed by both the Court for Children at Sepang and the Court for Children at Petaling Jaya.

[12] Both appeals were heard together on 5 November 2021.

[13] After having heard the submissions of the appellant's counsel and the deputy public prosecutor, the learned judicial commissioner dismissed both appeals of the appellant. The order imposed by the learned magistrates were affirmed.

A LEAVE APPLICATION IN THE COURT OF APPEAL

[14] The appellant thereafter applied for leave to appeal and leave was granted on two questions of law as follows in the national language:

B (a) isu undang-undang di bawah s 75(1)(b) Akta Kanak-Kanak 2001 iaitu samada Laporan Akhlak yang dikemukakan kepada mahkamah menepati peruntukan undang-undang di atas di mana tiada endorsmen di dalam Laporan Akhlak berkenaan yang menunjukan bahawa kanak-kanak itu tidak sesuai untuk dipulihkan di sekolah diluluskan;

C (b) isu undang-undang di bawah s 75(1)(c) Akta Kanak-Kanak 2001 iaitu samada mahkamah yang berkewajipan untuk menimbangkan Laporan Akhlak sebelum memutuskan untuk menghantar kanak-kanak ke Sekolah Henry Gurney dalam keadaan laporan Akhlak yang tidak menepati peruntukan s 75(1)(b) Akta Kanak-Kanak 2001 telah menyebabkan 'misdirection' yang tidak boleh diperbaiki di bawah Kanun Tatacara Jenayah.

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[15] Leave to appeal was accordingly granted to the appellant on 5 January 2022 under both Criminal Application No B-07-114–11 of 2021 and B-07-115–11 of 2021.

E

[16] As the result and after having heard the contested application of the appellant for a stay of enforcement of the orders, the learned judicial commissioner on 20 January 2022 granted the stay of enforcement of the orders pending the disposal of the appeals.

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[17] By that time, the appellant had already served three months in the Henry Gurney School.

G

FINDINGS OF THIS COURT

[18] The appeals were fixed before us on 19 April 2023.

H **[19]** At the outset, the appellant contended that the learned magistrates as well as the learned judicial commissioner made a serious misdirection by accepting the probation report produced by the welfare officer. According to the appellant, the probation report contravened s 75(1)(b) of the CA in that the probation report is devoid of any finding therein that the appellant is not I suitable to be rehabilitated in an approved school and thus, justified that he should be sent to the Henry Gurney School. In the premises, the order was irregularly imposed.

[20] The appellant further contended that a lighter punishment ought to be

meted based on one of the other options provided in s 91(1) of the CA. In this regard, the appellant reminded us that the welfare officer in the Court for Children at Sepang proposed that the appellant be bound over on good behaviour albeit the two advisors recommended the appellant to be sent to an approved school. Consequently, the learned magistrates as well as the learned judicial commissioner unreasonably imposed an immoderate punishment.

[21] The appellant also contended that the learned magistrate in the Court for Children at Petaling Jaya and consequently the learned judicial commissioner too erred in law by having adopted the proposal to send the appellant to the Henry Gurney School. This proposal is found in the welfare report which has been produced relying on the order already imposed on the appellant by the Court for Children at Sepang earlier.

[22] We were also apprised by the appellant that he is now more than 18 years old and over aged to be sent to an approved school. Moreover, he has, since the stay of enforcement of the order has been granted, diligently studied for and completed his Sijil Pelajaran Malaysia in a co-ed boarding school in Kuala Terengganu. Whilst waiting for his Sijil Pelajaran Malaysia results, he has returned home to live with his family. There has not been any misbehaviour by him todate.

[23] The respondent, in retort, contended that the appellant committed sexual offences that are serious in nature and he must accordingly be sent to the Henry Gurney School which is under the purview of the Malaysian Prisons Department. This is necessary in consideration of public interest especially the interest of the victims which included his own younger sister.

[24] In illustration of the seriousness of the offences, the respondent pointed out that the charges in the Court for Children at Sepang carried punishment of imprisonment not exceeding 20 years and whipping on the offence under s 14(a) of the Sexual Offences Against Children Act 2017 and punishment of imprisonment of not less than 15 years and not exceeding 20 years and whipping on the offence under s 377C of the Penal Code when committed by an adult. The charge in the Court for Children at Petaling Jaya similarly carried punishment of imprisonment not exceeding 20 years and whipping on the offence under s 14(a) of the Sexual Offences Against Children Act 2017 when committed by an adult.

[25] In the premises, the respondent contended that the order imposed by the learned magistrates which have been affirmed by the learned judicial commissioner is fit and proper in the circumstances.

[26] The relevant provisions in the CA that concern these appeals are as

follows with emphasis added by us:

> 2 Interpretation
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> ...
>
> '*grave crime*' includes —
>
> (a) the offences of murder, culpable homicide not amounting to murder or attempted murder;
>
> (b) all offences under the Firearms (Increased Penalties) Act 1971;
>
> (c) all offences under the Internal Security Act 1960 punishable with imprisonment for life or with death;
>
> (d) all offences under the Dangerous Drugs Act 1952 punishable with imprisonment for more than five years or with death; and
>
> (e) all offences under the Kidnapping Act 1961.
>
> ...
>
> 67 When a child can be sent to an approved school
>
> (1) If —
>
> (a) *a child is found guilty of any offence other than grave crimes*;
>
> (b) the probation report submitted to the Court For Children shows that the child is in need of institutional rehabilitation; and
>
> (c) it appears to the Court For Children that *although the offence committed is not serious in nature* but it is expedient that the child be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation,
>
> the Court for Children shall, after considering the probation report, *send the child to an approved school*.
>
> (2) If a Court for Children orders a child to be sent to an approved school, the order shall be an authority for his detention in that approved school for a period of three years from the date of the order.
>
> (3) Notwithstanding subsection (2) the Board of Visitors of the approved school to which a child is sent may, in their discretion —
>
> (a) shorten the period of detention for reasons which appear to them to be sufficient; or
>
> (b) permit any such child to be released for such period and upon such conditions as they may deem fit to impose.
>
> (4) A child shall not be permitted to be released from an approved school under paragraph (3)(b) during the first twelve months of the period of detention without the consent in writing of the Minister.
>
> 69 Further detention in approved school beyond period of order
>
> If the person for the time being in charge of an approved school is satisfied that a child —

(a) whose period of detention in the approved school is about to expire needs further care or training; and

(b) cannot be placed in suitable employment without such further care or training,

he may, if the Board of Visitors of the approved school consent, detain him for a further period not exceeding six months *but any such period shall not extend beyond the date the child attains the age of eighteen years*.

75 When a child can be sent to Henry Gurney School

(1) the Court For Children shall, after considering the probation report, send the child to a Henry Gurney School.

If —

(a) *a child is found guilty of any offence punishable with imprisonment*;

(b) *the probation report submitted to the Court For Children shows that the child is not suitable to be rehabilitated in an approved school*; and

(c) it appears to the Court For Children —

(i) *that the offence committed is serious in nature*; and

(ii) *by reason of the nature of the child's criminal habits and tendencies it is expedient that the child be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime*,

the Court for Children shall, after considering the probation report, send the child to a Henry Gurney School.

(2) If a Court For Children orders a child aged fourteen years or above to be sent to a Henry Gurney School —

(a) the order shall be —

(i) an authority for his detention for a period of three years from the date of the order; and

(ii) valid for his detention up to but not after he has attained the age of twenty-one years; and

(b) Sections 68 to 72 shall apply with the following modifications:

(i) for the words 'approved school' wherever appearing there shall be substituted the words 'Henry Gurney School';

(ii) in section 69, for the words 'the Board of Visitors of the approved school consent' there shall be substituted the words 'the Commissioner General of Prison in the case of a Henry Gurney School consents' and the age referred to in that section shall be increased by three years; and

(iii) in subsection 71(1), for the words 'probation officer' there shall be substituted the words 'prison officer'.

(3) Notwithstanding subsection (2), the Commissioner General of Prison may, in his discretion —

A (a) shorten the period of detention of a child in a Henry Gurney School for reasons which appear to him to be sufficient; or

(b) release any such child with permission for such period and upon such conditions as he may deem fit to impose.

B 91 Powers of Court for Children on proof of offence

(1) If a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to —

(a) admonish and discharge the child;

C (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court;

(c) order the child to be placed in the care of a relative or other fit and proper person —

D (i) for such period to be specified by the Court; and

(ii) with such conditions as may be imposed by the Court;

(d) order the child to pay a fine, compensation or costs;

(da) *make a community service order*;

E (e) *make a probation order under section 98*;

(f) *order the child to be sent to an approved school or a Henry Gurney School*;

(g) (Deleted by Act A1511: s.66)

F (h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court.

(2) The words 'conviction' and 'sentence' shall not be used in relation to a child dealt with by the Court For Children and any reference in any written law to a person convicted, a conviction and a sentence shall, in the case of a child, be construed as a child found guilty, a finding of guilt and an order made upon a finding of guilt respectively.

G (3) A finding of guilt of a child shall be disregarded for the purposes of any written law which —

(a) imposes any disqualification or disability upon a convicted person; or

H (b) authorizes or requires the imposition of any such disqualification or disability.

96 Restrictions on order of imprisonment

(1) A child under the age of fourteen years shall not —

I (a) be ordered to be imprisoned for any offence; or

(b) be committed to prison in default of payment of a fine, compensation or costs.

(2) *A child aged fourteen years or above shall not be ordered to be imprisoned if he*

can be suitably dealt with in any other way whether by probation, or fine, or being sent to a place of detention or an approved school, or a Henry Gurney School, or otherwise.

(3) A child aged fourteen years or above shall not, if ordered to be imprisoned, be allowed to associate with adult prisoners.

98 When probation may be ordered

(1) *If a Court For Children by or before which a child is found guilty of an offence other than* —

(a) *any grave crime*;

(b) *voluntarily causing grievous hurt, rape, incest or outraging modesty*; or

(c) *an offence under section 377B, 377C, 377D or 377E of the Penal Code*,

is of opinion that having regard to the circumstances, including the nature of the offence and the character of the child, it is appropriate to do so, the Court For Children may make a probation order.

(2) Before making the probation order under subsection (1), the Court For Children shall explain to the child in simple language suitable to his age, maturity and understanding —

(a) the effect of the order; and

(b) that if he —

(i) fails to comply with the probation order; or

(ii) commits another offence,

he shall be liable to be dealt with for the original offence as well as for the other offence.

(3) A probation order shall have effect for such period not less than one year and not more than three years from the date of the order as may be specified in the probation order.

(4) For the purposes of securing the good conduct and supervision of the probationer or preventing a repetition by him of the same offence or the commission of other offences, a probation order shall —

(a) require the probationer to submit during that period to the supervision of a probation officer;

(b) specify that the probationer is not to commit any offence during the probation order; and

(c) contain such other requirements, as the Court having regard to the circumstances of the case considers necessary including any one or more of the following:

(i) that the probationer shall reside at a probation hostel, at the home of his parent or guardian or relative or at some other place;

(ii) that the probationer shall attend an educational institution to be recommended by the probation officer;

(iii) that the probationer shall remain indoors at his place of residence, be it at the probation hostel or at a home, during hours to be specified.

(5) Without prejudice to the powers of the Court to make an order under section 91, the payment of sums by way of damages for injury or compensation for loss shall not be included amongst the requirements of a probation order.

(6) Before making a probation order containing requirements as to residence, the Court —

(a) shall consider the home surroundings of a child; and

(b) if the order requires a child to reside in a probation hostel, shall specify in the order the period for which he

is so required to reside, but that period shall not extend beyond twelve months from the date of the order.

(7) The Court For Children which makes a probation order shall —

(a) immediately give a copy of the order —

(i) to the probationer;

(ii) to the probation officer or other person under whose supervision the probationer is placed; and

(iii) to the person in charge of the probation hostel or other place in which the probationer is required by the order to reside; and

(b) except if it is itself the Supervising Court, send to the Court For Children for the district or area named in the order in which the probationer is required to reside during the probation period a copy of the order together with such documents and information relating to the case as it considers likely to be of assistance to that Court.

(8) A Court For Children on making a probation order may, if it thinks it is expedient for the reformation of the probationer, give the probationer to the charge of any person who consents to accept the probationer, on that person's giving security for the good behaviour of the probationer; and the provisions of the Criminal Procedure Code on forfeiture of bonds shall apply in relation to the security.

[27] First and foremost, it is necessary for us to determine whether the learned judicial commissioner, in affirming the order made by the learned magistrates, misdirected herself by failing to properly construe and apply the conjunctive sub-provisions in s 75(1), particularly s 75(1)(b) of the CA.

[28] From the rival submission of the parties, it is not in dispute that the offences committed by the appellant attracted a mandatory punishment of imprisonment when committed by an adult. Hence, the provision in s 75(1)(a) of the CA has been satisfied. We noticed that there is however discretion given to the court if committed by a child as provided in s 96(2) of the CA.

[29] In respect of the requirement of the probation report showing that the child is not suitable to be rehabilitated in an approved school as provided in s 75(1)(b) of the CA, the respondent conceded that this has not been shown in both probation reports produced by the welfare officer for use in both the Court for Children at Sepang and Petaling Jaya.

[30] Moving on to the provision in s 75(1)(c)(i) of the CA, we noticed the learned judicial commissioner equated the phrase 'the offence is serious in nature' with a serious offence as defined in s 52B of the Penal Code which denotes an offence punishable with imprisonment for a term of ten years or more. We however hold that the phrase does not necessarily meant as such. In our view, the court has to make an objective assessment on every relevant feature and character of the offence vis a vis the young offender particularly whether he/she knew the legal consequences thereof, apart from just the prescribed imprisonment term.

[31] As to s 75(1)(c)(ii) of the CA, we noticed that the learned judicial commissioner accepted the findings of the learned magistrates on the appellant's criminal habits and tendencies only as inflicted upon the three victims. There is however conspicuous absence of cogent consideration as to whether by reason of these habits and tendencies of the appellant, it is expedient that the appellant must be detained and subject to the instruction and discipline as that administered in the Henry Gurney School only. We are aware that this task of the learned magistrates as well as the learned judicial commissioner have not been made easy due to the absence of the welfare officer's explanation showing that the child is not suitable to be rehabilitated in an approved school in the probation report. However, we noticed that the two advisors in the Court for Children at Sepang recommended that the appellant be sent to the Sekolah Tunas Bakti approved school. Both the learned magistrates and the learned judicial commissioner also did not explain why they overruled the two advisors. We are nonetheless aware that the welfare advisor and two advisors in the Court for Children at Petaling Jaya recommended the appellant be sent to the Henry Gurney School which was accepted by the learned magistrate and the learned judicial commissioner but we find that the welfare officer and advisors' view has likely been coloured already by the order of the learned magistrate of the Court for Children at Sepang.

[32] In undertaking our review of the decision of the learned judicial commissioner, we are mindful that Abdul Hamid CJ (Malaya later LP) held as follows in *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b (SC) with emphasis added by us:

> *In this regard we would observe that it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it*

is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[33] We have therefore, in the exercise of our appellate duty as the apex Court, reviewed s 75(1) of the CA as a whole and hold that the concluding phrase 'the Court For Children shall, after considering the probation report, send the child to a Henry Gurney School' requires the court to evaluate on the explanation of the welfare officer in the probation report with regard to unsuitability of the appellant to be rehabilitated in an approved school. In the absence of such an explanation, we find that the order imposed on the appellant based on the infirmed probation report is illegal.

[34] Moreover, we find that the learned judicial commissioner did not properly interpret and apply s 75(1)(c) of the CA as elucidated by us above. She seems to have overly focused on the despicable acts of the appellant; the appellant must thus be punished with a custodial punishment. We also noticed that the learned judicial commissioner had in several parts of her judgment referred to and relied on old law based on repealed portions of the CA which had been amended by the Child Amendment Act 2016 in relation the appellant's parents' inability to control him. This is plainly impermissible; see *Sia Kwong Sang v Inspector General of Police & Ors and other appeals* [1991] 1 MLJ 502 (SC).

[35] Consequently, we find that the learned judicial commissioner had misdirected herself and appellate intervention is warranted.

[36] It follows that we will have to re-impose the punishment order against the appellant de novo in the unique circumstances here.

[37] In this regard, we refer and rely on the following dicta of Augustine Paul J (later FCJ) on sentencing in *Public Prosecutor v Tia Ah Leng* [2000] 5 MLJ 401; [2000] 5 CLJ 614, with emphasis added by us:

> *The phrase 'pass sentence according to law' in the section means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles* (see *Re Chong Cheng Hoe & Ors* [1966] 2 MLJ 252; [1966] 1 LNS 155 , *Public Prosecutor v Jafa Daud* [1981] 1 MLJ 315; [1981] 1 LNS 28 *Phillip Lau Chee Heng v Public Prosecutor* [1988] 3 MLJ 107; [1988] 2 CLJ Rep 144; [1988] 2 CLJ 873). In *R v Ball 35 Cr App R 164* the principles which should guide a court in considering the appropriate sentence that should be imposed was laid down in the following terms:
>
> > *In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is*

publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Therefore, one of the main considerations in the assessment of sentences is the question of public interest (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102 *Public Prosecutor v Darmalingam* [1987] 2 MLJ 519; [1988] 2 CLJ Rep 227 . It is left to the discretion of the court to pass an appropriate sentence within the prescribed maximum dependent on the particular circumstances of a case. Thus the observation in *R v Ball* that the public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living cannot be construed as a carte blanche argument for the avoidance of custodial sentences in all cases.

...

Another principle of sentencing, rendered significant by the facts of this case, is the effect of a guilty plea on the sentence to be imposed. It is settled law that a plea of guilt will operate as a mitigating factor in favour of an accused. Cases such as *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; [1975] 1 LNS 158 *Public Prosecutor v Sulaiman bin Ahmad* [1993] 1 MLJ 74; [1992] 3 CLJ Rep 447; and *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; [1992] 1 LNS 47 lay down the rule that an accused person should be given credit or discount for pleading guilty as it saves time and costs. However, that is only a statement of the general rule. The demands of public interest may, in the circumstances of a particular case, far outweigh any mitigating effect which might have been attached to an accused's guilty plea (see *Sim Gek Yong v Public Prosecutor* [1995] 1 SLR 537). In *Public Prosecutor v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181; [1998] 2 CLJ 370. I considered the applicable principles governing a guilty plea at pp 191–192:

> It is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Public Prosecutor v Ravindran & Ors* [1993] 1 MLJ 45; [1992] 1 LNS 47). However, as I had the occasion to observe in *Zaidon Shariff v Public Prosecutor* [1996] MLJU 159 at p 15; [1996] 4 CLJ 441 at p 446:
>
> > 205 *Be that as it may, this rule is not a strict rule as the court may in the exercise of its discretion, refuse to grant any discount in appropriate cases* (see *Lee Say & Ors v Public Prosecutor* [1985] 2 CLJ 155). ...

A **[38]** Simply put, we are tasked not to condemn the convicted person but to strike a balance that serves public interest to deter the recommissioning of the crime and rehabilitating that person.

B **[39]** The expository facts seen in the probation reports are that the appellant came from a family of both working parents. They did not have sufficient time to care for him. He began smoking since he was 12 years old. He quit smoking after he was discovered and admonished by his mother. He was prohibited by the rules of his boarding school from smoking too. He often also browsed pornographic websites in the internet on his mobile phone. This led to indecent text messages sent by the appellant to his colleague and most pertinently acts of outraging the modesty of his victims on two different occasions on two different days as charged. The victims included his own sister.

C

D **[40]** That notwithstanding, the appellant can read verses in the Al-Quran and often prayed at the nearby mosque when he stayed with his grandparents. After the occurrence of the incidents as charged, his father admitted that the appellant showed a change of attitude for the better. He spent more time at home focussing on his studies and less time on his mobile phone. He watched animated shows to avoid the urge to surf pornographic websites.

E

[41] Based on the facts before us, we are mindful that the appellant is a first-time offender as well as he has pleaded guilty to all the charges. We are further convinced that he fell astray but is now filled with remorse and shame of his teenage folly. We believe this realisation could have been attributed to the charges proffered against him and his consequent three months detention in the Henry Gurney School. The appellant, in our view, seems to have turn from his adolescent sexually mischievous way to decent living by presently concentrating on his study towards a better future.

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G **[42]** It is plain that we cannot presently send the appellant to an approved school because he is over aged: see s 69 of the CA. Nonetheless, we are satisfied that he does not require further preventive and rehabilitative detention.

H **[43]** In the circumstances, we are hence inclined to make a probation order under s 98 of the CA but we are prohibited from so doing because the offences here concern outraging modesty and s 377C of the Penal Code see s 98(1)(b) and (c) of the CA.

I **[44]** Subject to these constraints as well as gravity of the offences, it is our considered view that the appropriate punishment is to invoke s 91(1)(da) of the CA and order the appellant to perform community service of total of 100 hours as prescribed and supervised by the Social Welfare Department, Ministry of Women, Family and Community Development which may include

undergoing counselling, religious and moral education thereat. And we so order accordingly.

CONCLUSION

[45] Finally, while we acknowledge that the punishment now imposed may not be ideal and palatable to everyone, we prefer to place our trust on the appellant that he has learnt from the heinous episode and will not repeat it, failing which, he will not be spared from the full wrath of the law. The appeal are unanimously allowed and the order of the High Court is set aside and substituted to that as ordered in para [44] above.

Appeals allowed; order of High Court set aside.

Reported by Dzulqarnain Ab Fatar